

In the Matter of Fire Chief (PM3588E), Hillside Township
DOP Docket No. 2005-356
(Merit System Board, decided February 23, 2005)

The Township of Hillside, represented by George G. Frino, Esq., appeals the testing process, test administration, and the scores given by William Kosakowski, a Subject Matter Expert (SME), on the promotional oral examination for Fire Chief (PM3588E), Hillside Township.

An oral examination was developed for the title Fire Chief consisting of questions based on five scenarios. Each scenario was developed from a task or tasks that incumbents or supervisors of incumbents deemed important to job performance. Each question was designed to elicit responses that could be used to assess knowledge of these important areas. Candidate responses were then evaluated by trained assessors, each of whom is an SME in the field of fire fighting. The assessors compared each candidate's performance to predetermined performance guidelines or possible courses of action (PCAs). The oral assessment exercises measured behaviors in the following knowledge areas: Supervision-Delegation and Performance Goals, Supervision-Subordinate Incident/Interview, Fire Department Administration, Finance - Budget Preparation, and Fireground Operations Management.

For each scenario (with the exception of Finance - Budget Preparation, which is only given a technical score), candidates were scored on two components, technical and oral communication. The scores for the technical component were assigned by the fire SME, and scores for the oral communication component were assigned by a Department of Personnel representative trained in oral scoring. Each technical component was given a weight of .1667, and each oral communication component was given a weight of .0416.

This subject examination was administered on February 24, 2004 to four candidates in Hillside Township. Three candidates passed the examination — Robert Kreszl (a veteran), Raymond Colandrea and Dominick Napes (both non-veterans) — while Joachim Behnke failed the exam.

On July 7, 2004, Mr. Behnke filed an appeal of scoring and test administration. He indicates that he had not known that seniority was added only to the scores of candidates who passed the oral portion of the examination, and he states that all candidates should be notified of this before the examination. He argues that the process was complicated in that he could not determine if any mistakes had been made. He points out irregularities on the scoring sheets, stating that there were two scoring sheets for one room, apparently written by two people, having different scores and a crossed-out symbol.

Mr. Behnke states that the volume of his voice was low, and he was hesitant, and he attributes this to his recognition of the examiner in Room A. Mr. Behnke states that Mr. Napes said that he recognized the examiner in Room A as retired Bayonne Fire

Chief William Kosakowski, who he had seen at State FMBA meetings. Mr. Behnke states that Mr. Colandrea also told him that he recognized Mr. Kosakowski. Mr. Behnke states that Messrs. Naples and Colandrea both told him that they felt Mr. Kosakowski should have withdrawn from the examination.

Mr. Behnke then explained that Mr. Kosakowski was acquainted with all four candidates who took the examination, lived in Hillside for several years with his wife, the widow of a former Hillside Deputy Fire Chief. Mr. Behnke states that all four candidates were members of the Hillside Fire Department Employment Committee, and that he was the Chairman of the Committee in 2002 when Mrs. Kosakowski's son by her first marriage, Robert Ricci, was upon the recommendation of the Committee bypassed on a list for Fire Fighter (M0762U), dated February 1, 1999.

Mr. Behnke states that he did not recognize Mr. Kosakowski at first, as he had not seen him in eight years. He states that, when he was asked if he had any objection to any of the assessors, he said "no," as he had not yet recognized Mr. Kosakowski. Several minutes into the examination, he recognized Mr. Kosakowski, and became nervous, but he did not say anything. He states that the Department of Personnel did not issue any rules and guidelines to candidates to cover such an event. As a result of this recognition, he argues that his concentration and performance were severely affected, which resulted in his failing the examination. He also states that he is worried that Mr. Kosakowski spoke with the SMEs from the four other rooms in order to negatively influence his scores, and also that he spoke with Mr. Kreszl prior to the examination.

N.J.A.C. 4A:4-6.4(c), (Review of examination items, scoring and administration) states that appeals pertaining to administration of the examination must be filed in writing at the examination site of the day of the examination. If Mr. Behnke recognized Mr. Kosakowski and wanted to file an appeal of this issue, he was required to do so on the date of the examination. He does not provide a reason why he waited until July 2004, after he received the examination results, to file this appeal.

Mr. Behnke argues that this appeal should be decided regardless of timeliness issues, since the Merit System Board may relax time limits for non-disciplinary appeals and must address issues regarding examination security regardless of when they are raised, and relies on *In the Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993). It is noted that the issue in *Allen* was whether the Merit System Board acted in an arbitrary and capricious manner when it ordered Hazlet Township to reappoint a police sergeant, who had retired on disability but who was no longer disabled, to his former position upon the next vacancy and to aggregate his seniority to include prior and current permanent service. *Id.* at 440, 621 A. 2d 87. The instant matter pertains to a test administration issue and not an issue regarding examination security. It is noted that *N.J.A.C. 4A:4-6.4(c)* provides the timeframe to appeal test administration issues, such as the issue with Mr. Kosakowski. As noted in *Allen*, other appeals must, by regulation, be filed within 20 days after a party has notice or should reasonably have notice of the action or decision being appealed. See *N.J.A.C. 4A:2-1.1(b)* and *N.J.A.C. 4A:2-1.7(b)*.

Mr. Behnke retired on September 1, 2004. As such, in addition to being untimely, his appeal is moot. However, the Township of Hillside has continued the appeal.

In its appeal, submitted on September 7, 2004, the Township requested that the list for Fire Chief (PM3588E), Hillside Township be cancelled pursuant to *N.J.A.C. 4A:4-3.3* (Duration and cancellation of eligible lists), which states that the Commissioner may, in cases of fraud, illegality, test invalidity, error by the Department or other good cause, cancel an eligible list prior to its expiration date by issuing an order and notifying the eligibles and the affected appointing authorities. It states that improprieties in the testing process had an impact on the evaluation and ranking of the candidates. It requested and received a stay, in the form of a hold on this list, pending this decision.

The Township provides the following with respect to alleged improprieties: Mr. Kosakowski was assigned to Room A; he knew all four candidates personally; he has a long history of association with the Township's Fire Department; he had lived in the Township; he married the widow of a former Township Deputy Fire Chief; he is the former President of the NJ FMBA; his stepson, Robert Ricci Jr., applied for a paid Fire Fighter position in the Township and ranked first on the eligible list; Robert Ricci Jr. was bypassed on the recommendation of Mr. Behnke; Mr. Behnke's recommendation was based on Mr. Ricci's poor performance during an interview, his attitude, and a failure to appear for an appointment; all four candidates believed Mr. Kosakowski had a conflict of interest while serving as an SME; all four candidates recognized Mr. Kosakowski at the testing center; Mr. Kosakowski recognized all four candidates at the testing center; Mr. Naples greeted Mr. Kosakowski as "Chief" at the testing center; the candidates were asked if they had an objection to any of the assessors and the candidates answered "no;" the candidates were not advised by the Department of Personnel how to handle this situation; the candidates were unsure if the testing process would proceed if they objected to Mr. Kosakowski's presence; Mr. Kosakowski was not immediately recognized by two candidates due to a change in appearance; all candidates feared "creating trouble" during the testing process as it might negatively affect their scores. As a result of these issues, the Township contends that the bias of Mr. Kosakowski rendered the testing process manifestly corrupt and conspicuously unreasonable. It believes that Mr. Kosakowski was more than casually acquainted with the candidates and should have recused himself from the testing process.

The Township relies on *DiGiovanna v. Department of Civil Service*, 166 N.J. Super. 280 (App. Div. 1979) in support of its arguments. In *DiGiovanna*, it was found that an oral examination was not discriminatory because one applicant was tested by an administrator and one consultant while the other five applicants were tested by an administrator and two consultants, in absence of evidence that one team applied evaluative guidelines and graded candidates on a more stringent basis than other teams. The Township states that this decision strongly suggests that it is appropriate, and even encouraged, for an evaluator to remove himself from the testing process due to a potential conflict of interest with one or more of the candidates. *Id.* at 282-283.

Further, the Township indicates that one of nine of Mr. Behnke's scoring sheets had an incorrect symbol, which was crossed out, and the correct symbol was written above it. Also, it states that two of Mr. Behnke's scoring sheets had F1 (a code for the assessor in Room A), while another of the assessor codes was missing. The Township suggests that this is evidence that Mr. Behnke's test results were intentionally manipulated, rendering the testing process unfair. It relies on *Rox v. Department of Civil Service*, 141 N.J. Super. 463 (App. Div. 1976), wherein the same standard was not used in testing every candidate is one team of examiners migrated the candidates on the more stringent basis than other teams. It was decided that the oral testing format was not fair and impartial and required the results of the oral examination be invalidated.

Next, the Township expresses concern that the Department of Personnel failed to notify the candidates of the passing point, and that if a candidate failed the exam, the seniority portion was "thrown out." Also, the Township states that failure to notify the candidates of the passing point constituted a testing error which warrants cancellation of the list.

Prior to Mr. Behnke's retirement, Mr. Robert Kreszl, represented by David DeFillippo, Esq., requested that the appointing authority appoint him from the list. Mr. Kreszl ranked first on the list, and as he is a veteran, he cannot be bypassed. Mr. Kreszl was provided with Mr. Behnke's and the Township's arguments and asked for comment. He responded that the former permanent Fire Chief, Frank Caswell, retired on or about January 31, 2003, at which time, the Township provisionally appointed Mr. Behnke as the Fire Chief, pending promotional examination. As a result of the subject examination, certification PL041007 was issued, with a disposition due date of September 6, 2004. The Township did not respond to Mr. Kreszl's repeated requests for an appointment, and Mr. Behnke continued to serve as the provisional Fire Chief until his retirement on September 1, 2004. Mr. Kreszl requests that the Township be ordered to dispose of the list and regularly appoint him to the position, and he requests retroactive seniority, back pay, and reimbursement for reasonable attorney fees due to the Township's bad faith challenge.

Mr. Kreszl further observes that Mr. Behnke is retired, that Mr. Kreszl was appointed to the position of Deputy Chief in December, 1990 on the same day as Mr. Behnke, and that he was hired by the Township four years before Mr. Behnke. Regarding Mr. Kosakowski, Mr. Kreszl states that he never knew Mr. Kosakowski personally, and their interaction was limited to a brief introduction at a social gathering a few years prior to the Fire Chief test. He states that he never expressed surprise or concern regarding Mr. Kosakowski's ability to serve as an SME. Mr. Kreszl states that the Township is knowingly and willfully fabricating an appearance of impropriety or bias. Mr. Kreszl points out that he was also a member of the same employment committee which ultimately bypassed Mr. Ricci, and that it was Mr. Kreszl who forwarded a memo to former Chief Caswell regarding the concerns of the committee regarding Mr. Ricci's suitability for employment. Mr. Kreszl states that Mr. Behnke lied when he stated that Mr. Kreszl and Mr. Kosakowski conversed prior to the examination, and he maintains that they had had no contact for more than two years prior February

2004. Mr. Kreszl states that Mr. Behnke has impugned the integrity of an assessor for a prior examination (PM0432U), when he asserted that the assessor presided over a study group for that examination.

Mr. Kreszl argues that Mr. Behnke is retired, and that nowhere does the Township provide evidence that the three remaining candidates were treated unfairly and subjectively. He asserts that the Township has no standing to appeal the validity of the examination, and that it merely reiterates Mr. Behnke's arguments, which were untimely. He asserts that the Township has failed to demonstrate any bias that Mr. Kosakowski held against Mr. Behnke, ignored the facts that no candidate expressed objections to Mr. Kosakowski's participation in the testing process, that Messrs. Naples, Colandrea and Kreszl served on the same Employment Committee as Mr. Behnke, and that Mr. Naples had the most contact with Mr. Kosakowski in his role as President of Hillside's Local FMBA. He argues that the Township has not proven that the administration of the Fire Chief examination was so egregious and manifestly corrupt as to violate each candidate's right to a fair and competitive examination as guaranteed by the State Constitution. *See In the Matter of Police Sergeant, City of Paterson*, 176 N.J. 49, 52 (2003).

Regarding seniority, Mr. Kreszl points out that his seniority would be higher than that of Mr. Behnke, had he passed the examination, and that seniority is not added to failing scores pursuant to *N.J.A.C. 4A:4-2.15(b)*. As to the scoring sheets, Mr. Kreszl states that the writing on the scoring sheets constituted benign mechanical errors, and not a manipulation of the test scores. *See Brotspies v. Department of Civil Service*, 72 N.J. Super. 334 (App. Div. 1962).

In reply, the Township argues that Mr. Behnke's retirement does not moot its appeal as it has an interest in a non-compromised testing process. It states that its appeal is timely as the list has not yet expired. Again, the Township argues that candidates need to know the passing point prior to the administration of the examination. Also, it asserts again that there are blatant mistakes on the scoring sheets which evidence manipulation of scores. The Township states that it desires to have a candidate appointed based solely on merit and skill, and it requests that this list be declared invalid and a new examination be given.

CONCLUSION

As Mr. Behnke retired, his appeal is clearly moot. Also, prior to being moot, Mr. Behnke's appeal of the involvement of Mr. Kosakowski in the testing process was untimely. The remainder of Mr. Behnke's appeal is without merit. Seniority has never been added to failing scores for any type of examination pursuant to *N.J.A.C. 4A:4-2.15(b)3* (Rating of Examinations) which states, in pertinent part, that candidates who fail an examination shall not receive credit for seniority. To be placed on the list, candidates must pass the minimum requirements for the test.

In order to preserve the relative weighting of each of the components of the examination, the ratings for each examination component were adjusted by a well-

recognized statistical process known as "standardization." Under this process, the ratings were standardized by converting the raw scores to z-scores. The z-scores were then weighted based on the value of each component as determined by the job analysis. The weighted scores were summed and this became the overall final score. All scores above -0.50, or half a standard deviation below the mean, were considered passing. This passing point was not set prior to administration of the examination. Candidates do not need to know passing points in order to take an examination; in fact, in most instances, the passing point is not set until after the examination has been given. Even if candidates had known that the passing point would be half a standard deviation below the mean, this information is not helpful as a "standard" that they could try to achieve.

Candidates were notified of their scores and ranking and were permitted to listen to the audio tape of their oral examination. Candidates were also provided with nine score sheets, one for each component, which provided candidates with their score for the component and the comments made by the assessor. Mr. Kosakowski, whose examiner code was F1, was the assessor of the technical component in Room A, which was for Supervision-Delegation and Performance Goals. Mr. Behnke received a score of 3 for this component and the examiner comments were, "Candidate mentioned 6 of the listed PCA's and one other plausible response. He finished with his answers in less than 4 minutes (prior to redirection). He needed prompting to arrive at some PCAs."

The scoring sheet for Room D, Finance – Budget Preparation, had the symbol PM3550E crossed out and the symbol PM3588E written above it. The examiner code was F5, but it should have read F4. The remainder of the scoring sheets had no erasures, errors, or crossed out information, including the one prepared in Room A by Mr. Kosakowski, and the one for the technical component in the fifth room which was prepared by F5. The examiner code is used to identify an assessor for internal purposes, particularly when the jurisdiction is very large and requires many assessors. It has no effect on the score. This examination had 5 rooms, one for each knowledge area, and the knowledge area was pre-printed on the scoring sheet. Clearly, the assessor, who was not Mr. Kosakowski, used the wrong code. He should have used F4 instead of F5. He also wrote in a symbol at one point, and either decided to use this particular sheet of paper for this exam, or realized he used the wrong symbol number. Either way, the incorrect symbol is crossed out, and the correct symbol is written in. The comments on the sheet match Mr. Behnke's performance; undoubtedly, this is the score for Mr. Behnke for the Finance – Budget Preparation knowledge area.

Hillside Township has merely continued Mr. Behnke's appeal after his retirement. It argues that it has a vested interest in an unbiased examination, desires to have a candidate appointed based solely on merit and skill and, to this end, can appeal examination results until the expiration of the list.

N.J.A.C. 4A:4-3.3 allows the Commissioner to cancel an eligible list prior to its expiration date in cases of fraud, illegality, test invalidity, error by the Department or other good cause. This does not signify that appeal rights are available through the life of the list regardless of notice of the action being appealed. Appeal rights are plainly given

in *N.J.A.C. 4A:2-1.1(b)*, *N.J.A.C. 4A:2-1.7(b)*, *N.J.A.C. 4A:4-6.4(c)*, and other rules. As noted above, the timeframe to appeal test administration issues, such as the issue with Mr. Kosakowski, was on the date of the examination, and other appeals must, by regulation, be filed within 20 days after a party has notice or should reasonably have notice of the action or decision being appealed. Mr. Behnke copied the Mayor of Hillside, and the Hillside Council President, on his initial appeal dated July 11, 2004. Thus, the Township's appeal is untimely.

Nonetheless, there is no evidence of assessor bias or improprieties in the testing process. The most apparent evidence of scoring is a review of the examinations. The examinations were audiotaped and, for appeal purposes, the audiotapes, PCAs, assessor notes and related examination materials were reviewed. This review finds that Mr. Behnke was correctly scored. It is possible to provide a detailed analysis of Mr. Behnke's performance and an explanation of his scores, but since he is retired, it would serve no purpose. However, for this appeal, it is noted that in Room A, he received a score of 3 (minimally acceptable response) for Supervision–Delegation and Performance Goals from Mr. Kosakowski. During his performance, Mr. Behnke needed redirection four times, asked the assessor if *he* had any questions, and told the assessors that he was the provisional Fire Chief for the last twelve months and has had problems with explaining plans to people unfamiliar with fire department operations. He mentioned six of the listed PCA's and one other plausible response, out of a possible 16 PCAs. His performance does not warrant a score of 4 (more than acceptable response).

As a result of Mr. Behnke's assertions, the assessors were each sent a copy of the file and asked for comments. In response, Mr. Kosakowski states that he met Mr. Behnke once when he lived in Hillside, but he doesn't remember the meeting, and he does not know Mr. Naples or Mr. Colandrea. He states that he doubts he could remember any of them as he stepped down from his union position in 1989. Mr. Kosakowski states that he has recused himself in the past when he recognized someone and felt he could not be unbiased. He states that he did not know he was going to be testing the candidates for Fire Chief in Hillside until he sat in the testing room, and then, he did not recognize the candidates. He states that one of the candidates called him "Chief" and shook his hand. He was not disturbed by this, as many candidates call the assessor "Chief" and shake hands routinely as a matter of respect, since candidates know that most assessors are active or retired chiefs. He found no reason to be alerted by this action on the part of this candidate. Mr. Kosakowski states that he did not collaborate with other SMEs in order to influence their scores. Two SMEs have concurred with this assertion.

Regarding Mr. Ricci, Mr. Kosakowski states that he was not involved in the process of entry-level Fire Fighter appointments. He states that Mr. Ricci was an attorney at the time and was old enough to make his own decisions. He states that, as a private citizen, he could not have been involved in the details of the decisions made by the Hillside Fire Department.

Prior to the start of the performance, each candidate was read the following by the DOP assessor, "The Department of Personnel has a policy of anonymity. We will remain anonymous to you and will be referring to you by your ID number only. The proceedings will be audio-recorded. Were you given a candidate information sheet when you arrived? Have you signed the pledge form? Do you have any reason to object to either of the assessors in the room today? Were you given 60 minutes to prepare for scenarios 1, 2, 3 and 4? When it appears as if you've completed your response, I'll ask you if you have anything to add. This does not mean that you have or have not missed anything. Do you have questions about the process before we begin?" After the candidate responds to this, the assessor then states the title and symbol, the candidate ID number, and asks the candidate if this is correct. The assessor then states the knowledge area being tested in the room, the amount of time given to respond, and that there will be a two-minute warning at the eight minute mark.

In the instant matter, none of the candidate replied that they had a problem with any assessor in any room. The Township argues that Mr. Kosakowski was not immediately recognized by two candidates due to a change in appearance and that the candidates were not advised by the Department of Personnel how to handle this situation. It states that the candidates were unsure if the testing process would proceed if they objected to Mr. Kosakowski's presence and they all feared "creating trouble" during the testing process as it might negatively affect their scores.

Contrary to the Township's assertion, the Department of Personnel intentionally asks the candidates if they have any reason to object to either of the assessors in the room precisely because of "perceived" bias. Only the assessor himself or herself knows if he or she holds bias for or against a candidate, and it is his or her responsibility to alert the other assessor and Center Supervisor if that is the case. Mr. Kosakowski has stated that he was not biased towards or against any candidate, and none of the candidates objected to his presence during the examination. If candidates felt that they could not respond truthfully to this question, or if the candidates were unsure how to handle the situation, they had the opportunity at the test center to speak with the Center Supervisor to resolve the issue at the time. Instead, Mr. Naples and Mr. Colandrea have not filed an appeal on this issue, and Mr. Behnke waited until July 2004, after he received his examination results. The Township has not produced any evidence of manipulation of scoring for any candidate, and a review of the examinations supports that the candidates were correctly scored.

Mr. Kreszl requests retroactive seniority, back pay, and reimbursement for reasonable attorney fees due to the Township's bad faith challenge. It is noted that pursuant to *N.J.A.C. 4A:2-1.5*, back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. This rule further provides that in all other cases, such relief may be granted where sufficient cause exists based on the particular case.

In this case, Mr. Kreszl has not presented sufficient cause to grant any of the requested remedies. In this regard, the existence of a name on an employment list is not a guarantee of employment. Rather, it provides candidates with opportunities for

employment should the appointing authority be hiring. Further, a retroactive seniority date cannot be established in the absence of an improper appointment. No appointments have been made, and there has been a hold placed on the list pending the outcome of this decision and thus, the present record does not provide a basis for a retroactive appointment date. It is noted as well that back pay is based on retroactive seniority.

Moreover, the record does not establish bad faith or some invidious reason on the part of Hillside Township. The Township has a right to appeal and has exercised its legitimate right to claim improper bias. Based on the fact that Mr. Kosakowski could have known the candidates due to his history in the Township, the Township's appeal is not improper and the issue had to be explored by the Board. If Mr. Kosakowski was biased against a candidate, this may have adversely affected candidate scores. These circumstances do not present a case in which back pay and counsel fees are recoverable. See *In the Matter of Patrick M. Tortorello, Jr.*, Docket No. A-4460-02T3 (App. Div. June 1, 2004) (Affirmed the Board's decision to deny back pay and counsel fees to eligible who was restored to a County Correction Officer eligible list, since such an award is limited to disciplinary and layoff actions or where an appointing authority unreasonably failed or delayed to carry out an order or for sufficient cause based on the particular facts of the case); Compare, *In the Matter of James E. Ganley and Code Enforcement Officer*, Docket No. A-3234-02T2 (App. Div. June 15, 2004) (Finding "sufficient cause," the Appellate Division remanded the matter to the Board for a determination of reasonable counsel fees to be awarded to the appellant for Jersey City's obvious attempt to circumvent merit system appointment requirements). Thus, the Board finds no basis to award back pay and counsel fees.

Accordingly, it is ordered that the appeal of the Hillside Township be denied, the hold on the certification shall be lifted, and Hillside Township shall properly dispose of the June 7, 2004 certification of the Fire Chief (PM3588E), eligible list, to provide an appointment to Mr. Kreszl, absent any other reasons for removal from the list, pursuant to *N.J.A.C. 4A:4-4.8(a)3ii*.

ORDER

Therefore, it is ordered that this appeal be denied and the list for Fire Chief (PM3588E), Hillside Township be disposed of within 30 days of receipt of this decision.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.